No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation
Appellant and cross-appellee,
v.
TWOHY BROTHERS COMPANY, a corporation
Appellee and cross-appellant.

Upon Appeal from the United States District Court for the District of Oregon

PETITION FOR REHEARING

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FILED

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PETITION FOR REHEARING

Now comes appellant and petitions this Honorable Court for a rehearing of this cause upon the following grounds:

1. The decision of this Court upon the breach of contract claim (the commercial haul claim) is erroneous in that it misconstrues the contract between the parties, first, by assuming that the contract gave appellee, Twohy Brothers Company, the right to haul

commercial traffic over appellant's railroad for a stated period and without regard to the completion of construction work thereon, and second, having assumed the existence of such right, in holding and deciding that the contract provisions for stopping work and for changing the work did not permit appellant to terminate any such right.

2. The decision of this court directing the addition of interest to the award of $125,000 as damages for breach of contract is erroneous in that it undertakes to increase the damages fixed by the trier of fact as full compensation to the injured party, *up to the time of judgment*, and misinterprets and misapplies the decisions of the Supreme Court of the State of Oregon upon a local question, viz., the meaning of the Oregon interest statute (Section 57-1201, Oregon Code Annotated).

1.

(a) EXTENT OF COMMERCIAL HAUL CONTRACTED FOR

The first question presented by the record submitted to this Court was whether the contract between the parties gave appellee the exclusive right to haul logs for appellant as "commercial haul" for a stated period, or whether the contract right was limited to

the handling of any cars accepted for transportation while appellee was engaged in construction work and was operating work trains.

The decision of this Court dismisses this question with the assertion that the contract called for both construction work and non-construction work, the latter to include commercial haulage, and the two classes of work to be "mutually exclusive in function"; and the decision seems merely to assume that the contract obligation to complete grading, bridging, etc., by June 1, 1927, "and all work *on or before* September 1, 1927" (R. p. 52), compelled the continuance of work until the latter date and correspondingly entitled the contractor to continue commercial hauling up to that date.

This is contrary to the plain intent of the contract. At most, the commercial haul mentioned in the price items (in the contract proper, R. pp. 63-64) and described in the Tracklaying and Surfacing Specifications (R. p. 123) comprehended merely such cars of commercial traffic as the Railway Company might decide to accept for transportation while the construction of the line was in progress and while the contractor was operating work trains. We understand it to be conceded that the Railway Company was

under no obligation to accept a single car of commercial traffic for transportation by the contractor.

The contract required the contractor to complete all work *on or before* September 1, 1927 (R. p. 52). There was no specified "commercial haulage" to be brought to a conclusion at this time. How can this time limit upon the contractor's construction work be construed as a commitment entitling the contractor to continue non-construction or incidental service to the end of the period allowed? If by careful planning the contractor succeeded in finishing all construction work *before* September 1, 1927 (and the obligation to do this, if possible, seems plain), is there anything anywhere in the contract that would justify retention of the line, until September 1, 1927, for the purpose of non-construction activities, such as commercial haulage?

This Court's decision imports such a provision into the contract. With no obligation to provide a single car of commercial traffic for hauling by the contractor, and with the contractor's right limited to the handling of such cars as were accepted for transportation while the contractor was at work on the construction of the line, up to some date *not later* than September 1, 1927, this Court proposes to accord the contractor the exclusive right to handle commercial traffic accepted

for transportation by the Railway Company *after the construction work had ended* and until the expiration of the period allowed for the construction work.

This is plainly a distortion of the contract. When the construction work ended on the first 29 miles of the road, the right to handle commercial cars thereon likewise ended. We repeat that the provision fixing a date *on or before* which the construction work must end cannot be read as entitling the contractor to continue non-construction work after the construction work had ended.

The construction work on the first 29 miles of the road was terminated at the direction of the Railway Company. Its purpose was to begin the log transportation service for which the road was built. This does not mean that the contractor was deprived of any construction work for which it might have been paid. The track work was paid for in full, and the contractor would have received nothing more if it had done all of the track finishing work that might have been required of it under the contract.

What the Railway Company did was to accept the track finishing work which had been done up to June 15, 1927 (on the first 29 miles of the road) as sufficiently complete for its purposes, paying the contractor the full contract price therefor. The Railway Com-

pany's right to do this could not ordinarily be disputed. It is questioned here only because the termination of construction work by the contractor also brought to an end the transportation of commercial freight in the construction work trains.

But there is nothing whatsoever in the contract even to suggest that the construction work must be continued to the limit of the time allowed for its completion, *in order to permit* continued commercial haul by the contractor. Such a contention rests upon the assumption that there was an implied obligation to leave the contractor in possession of the line until completion of everything that the Railway Company could possibly require of the contractor for the per mile price paid for the track work, so that the contractor might enjoy the commercial haul privilege as long as possible. The contract cannot be so read.

We therefore submit that the Court erred in assuming that the contract gave the contractor the right to handle commercial traffic for a fixed period ending September 1, 1927, regardless of the termination of construction work before that date. It should be apparent, too, that if there was any such "commercial haulage" right, and if such non-construction work were "mutually exclusive in function," as the decision suggests, the commercial haul obligation could not be

enforced (except as to cars actually accepted for transportation while the contractor was engaged in the construction work) because of want of mutuality.

Appellee had no right, under its contract with appellant, to compel the acceptance of a single car of commercial traffic. No substantial log traffic during construction was contemplated when the contract was entered into (R. pp. 210-211), so that there is no analogy to contracts for a season's supply of merchandise, or for the requirements of an industry for a stated period.

Appellee was obligated to haul cars if and when requested to do so by appellant, but appellant was under no obligation to cause any cars to be hauled. Such an arrangement lacked mutuality and its cancellation by appellant cannot serve as the basis of a breach of contract claim.

The decision of this Court to the contrary ignores *Knox v. Lee*, 12 Wall. 457, 20 L. Ed. 287, *Maryland v. Railroad Company*, 22 Wall. 105, 112, 22 L. Ed. 713, and *Dennis v. Slyfield*, 117 Fed. 474.

(b) THE "STOP WORK" AND "CHANGE OF WORK" CLAUSES.

Appellant's resort to the stop work clause of the contract when the contractor's work on a part of the line was terminated seems to have misled the Court.

At least the decision seems to assume that the only question presented was whether the contractor's right to the commercial haul could be terminated under the stop work clause; appellant's contention that the contractor had no such continuing right seems to have been disregarded.

Appellant gave notice under the stop work clause, not in recognition of any right to continue the commercial haul but because appellee had asserted this right after having been told of appellant's plan to begin log transportation as soon as the track (on the first 29 miles) was usable (R. pp. 194-195, 200-201, 205, 210-211). Appellant maintains that the contract did not give appellee the right claimed; appellant further maintains that if the contract can be construed as giving appellee any such right, it was extinguished by the steps taken by appellant under the stop work clause.

The contract between the parties provided for the doing of certain work by appellee, the contractor. Appellant, the owner, reserved the right to stop this work, or any part thereof, at any time. This Court now says that, however plain and unambiguous the words, the parties did not mean this at all, but intended to say only that appellant's project, or any part of it, could be stopped. In result, the right to

stop any part of the work being done by the contractor at any time, for any reason, or for no reason, so plainly expressed in the contract without limitation or qualification, is now to be sharply limited; it is not to be exercisable at all unless the project, or the particular part involved, is to be halted, temporarily or permanently.

We respectfully submit that this Court, instead of interpreting the contract, has assumed an intent not stated in the document and has in effect rewritten the contract to state that intent. It is said that to stop the contractor's operations and then to continue the same work with the Railway Company forces would be inconsistent with the agreement that the contractor was to perform the work; and to resolve this inconsistency the Court found it necessary to construe the word "work", determining that it must have meant not the work in which the contractor was engaged at the time, but the project which was the subject of the contract.

This reasoning fails to recognize that the stop work reservation is a limitation upon the agreement entitling the contractor to perform the work. As such it creates no inconsistency or lack of harmony which would permit an exploration to find a meaning other than that stated by the plain words of the limitation.

In plain and unambiguous words, the Railway Com-

pany reserved the right to stop the Contractor from working, on the whole or on any part of the job. The reservation went further than this; the contractor could be required to reduce or diminish the force employed at any time. If the parties intended that this right could be exercised only when the project was to be discontinued or suspended, they failed to say so in their contract, and this Court has no right now to import such a limitation into the contract. That they did not so intend and that the "work" to be stopped was simply the work which the contractor was doing, is evident from the succeeding provision for *reducing* the force employed on the work at the Railway Company's direction. This could relate only to the work which the contractor was engaged to perform and was performing; it could have no application to work performed by anyone else.

We urge the Court to re-examine the succeeding paragraph of the contract on the subject of "accelerating work" upon which the decision relies for support of the conclusion reached as to the meaning of the word "work". Both paragraphs deal with *the work contracted for*, not with the railroad extension project apart from or independent of the particular contract entered into. It was the work contracted for by appellee, that could be stopped or reduced; and simi-

larly, it was the work which appellee had contracted to do that could be accelerated. Obviously it is referred to as "the work" in the provision for the employment of other means or agencies upon default of appellee. But it is nevertheless the work contracted for that was meant; and this is equally true of the "work" which could be stopped or reduced under the provisions of the stop work clause.

We think it apparent that the Court has resorted to rules of construction to impart to the word "work" in the stop work clause of the contract an ambiguity which does not in fact exist. This was clearly error; without an ambiguity in the words used, the Court had no right to seek elsewhere for the intent of the parties. The privilege of stopping or reducing the work could refer only to the work being done by the contractor. There is no occasion for the application of rules of construction; the substitution of the word "project" for the word "work" (and that is the effect of the decision), in order to place a limitation upon the reservation in accordance with the supposed intent of the parties, is entirely unwarranted.

We need not remind the Court that in construing questioned contracts, the duty to search out the intention of the parties arises from an ambiguity or omission which makes the meaning uncertain. If the

language used is plain, it must be enforced. *Kanasket Lumber & Shingle Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15.

Even though it may be thought that the true intention of the parties has not been expressed by the contract, the Court cannot rewrite the contract (at least in an action at law), and unless the contract is ambiguous, rules of construction cannot be invoked for the purpose of imparting ambiguity that does not in fact exist. *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489; *National Surety Co. v. McGreevy*, 64 F. (2d) 899.

The comments of the court in *Kentucky Rock Asphalt Co. v. Fidelity & Casualty Co. of New York*, 37 F. (2d) 279, 280, are in point:

> "The parties were competent to choose their own language and it must be assumed that they wrote the contract as they intended . . . To eliminate these provisions would be to write a new obligation for the parties into which they had not entered, or, in other words, to reform the contract, a relief permitted neither by the pleadings nor by the facts."

No precedent has been found, and we think none can be found, for the refusal to enforce the stop work reservation as written. *Marsch v. Southern New England R. Corp.*, 120 N. E. (Mass.) 120, 124, referred

to by the Court, concededly gives effect to a somewhat similar reservation although the continuance of the work by someone else was contemplated.

But this Court has misread this decision of the Massachusetts Supreme Court and has not given it the weight to which it is entitled. This Court's decision says (p. 5):

> "In a Massachusetts case a clause giving the Railway the right 'to suspend the progress of the work', on demurrer, was held to give the right not only to stop the contractor's performing the contract but to permit continuing the work by other persons."

The Court will find by examining the case (120 N. E. 120, 124) that it was not the clause relating to the suspension of the progress of the work that was questioned because of the purpose to give the work to someone else. The complaint asserted a breach of contract because certain portions of the work were taken away from him. This allegation was held insufficient because of the owner's right under the contract "to omit or deviate from the plans and specifications or work as it may deem expedient," without liability for damage for loss of anticipated profits because of any such "change, deviation or omission."

This Court's decision notes that after this ruling of the Massachusetts Supreme Court, the *Marsch* case

was dismissed (126 N. E. 519) and then recommenced in the Federal Court where a large judgment was given the contractor (45 F. 766, 767). The significance of this is not apparent; for aught that appears in the decision of the Circuit Court of Appeals affirming the judgment, the claim of lost profits for deprivation of work, which was disallowed by the Massachusetts Supreme Court, was abandoned.

Thus the only case discoverable, sufficiently similar in its facts to justify considering it a precedent, is squarely against the position taken by this Court. If the right to omit work or to deviate from plans or specifications as deemed expedient permitted the owner to lift parts of the work out of the contract and to engage others to do them, surely the right to stop any part of the work is to be literally enforced, no matter what plan the owners may have for subsequent performance of the work affected.

Appellant's argument that the "change of work" clause (the last paragraph of the contract, R. p. 72) confirms the unrestricted right to stop any part of the contractor's work seems to have been completely misunderstood. The decision says (p. 4):

> "The Railway argues in support of the contrary construction that it created no hardship to the Contractor to require it to stop work, since

> the work, including haulage, was to be paid for at unit prices and not by a lump sum for the line and haulage as a whole."

What appellant argued was that the contractor was safeguarded against hardship resulting from loss of any of the work by the provision of the contract for an *increase* of unit prices on the work remaining. (Appellant's Brief, pp. 44-46.) Any change in the amount of work to be done (and changes, *and consequently reductions,* in the amount of work embraced in the contract were specifically provided for, R. p. 72) called for a revision of the unit prices if in the judgment of the Chief Engineer the change materially affected the cost of doing the work (R. p. 72).

This provision of the contract seems to have escaped the Court's notice. Its importance is obvious. If the words "may stop the work or any part thereof, or may reduce the force employed or retard the work or any part thereof" can possibly have some other meaning than that plainly expressed, and if resort to other provisions of the contract is warranted, we submit that the "change of work" clause with its provision for change of unit prices completely negatives the idea that parts of the work under way could not be stopped and later continued by the Railway Company, where the result was to deprive the contractor of profitable work.

This Court's decision says in effect that the parties did not mean what they said in the stop work clause of the contract. Because such provisions have been resorted to where the project was temporarily or permanently suspended, as in *Warren-Scharf Asphalt Paving Co. v. Laclede Const. Co.*, 111 F. 695, this Court assumes that *only* on such occasions can the broad right here reserved be invoked. But the *Warren-Scharf* case justifies no such conclusion. Moreover, the decision in that case upheld the right to abrogate the contract entirely, even though the suspension of the project was only temporary, leaving the owner free to continue the work later through someone else and thus to deprive the contractor of the work originally contracted for. This is what the parties said in their contract and the Court could find no reason for declining to enforce it.

Appellant asks this Court similarly to enforce its contract with appellee as written.

2.

ADDITION OF INTEREST TO THE $125,000 DAMAGE AWARD

This Court's direction (Item D of the decision) to add ten years' interest to the damage award of $125,000 proceeds upon a misconception of the nature of the trial court's finding as to the damages sustained.

The decision assumes that the trial court arrived at the figure of $125,000 by estimating the number of car miles of log traffic run by appellant between July 17, 1927, and September 1, 1927, and then deducting the estimated operating costs which appellee would have incurred if it had conducted the operation. Upon this assumption, the decision speaks of the award of $125,000 "as the net amount the contractor would have left if the Railway had not failed to pay its agreed prices."

This assumption and the conclusion drawn from it have no basis in any finding of the trial court. On the contrary, Finding XVIII, which fixed the amount of the award (R. p. 169) and the trial court's opinion (R. pp. 339-340), make perfectly clear that because of lack of evidence on the subject, an estimate of net operating results for the period in question was not attempted. Instead the trial court proceeded, as a jury would have done had the case been tried to a jury, to fix a lump sum as the total damages attributable to the breach of contract.

Finding XVIII noted that the net operating results for two longer periods (July 17, 1927, to October 25, 1927, and July 17, 1927, to December 31, 1927) were ascertainable but there was nothing in the record to show how much of the total commercial haul

in these periods had moved *before* September 1, 1927, or during the period in which the contract was found to have been breached—July 17, 1927, to September 1, 1927 (R. p. 169). The oral opinion explained this and offered to receive further proof in order to ascertain the damages more accurately, but the offer was not taken advantage of. The trial court said (R. p. 340):

> "But, although figures were presented in detail for other periods, *there is no accounting as to the number of logs hauled by the Railroad Company between June 1st and September 1st.* The Court, however, must arrive at some conclusion as to the logs, and therefore assesses the damages for breach of this clause of the contract at $125,000. If the parties agree, however, further proof may be submitted upon this issue to find the damage more accurately." (Italics ours.)

It is beyond question, therefore, that the trial court did not undertake to ascertain the amount that appellee would have earned in hauling logs between July 17, 1927, and September 1, 1927. Instead, the sum fixed was intended to be the equivalent of a jury verdict, that is, an assessment of the total damages attributable to the breach of contract, inclusive of all elements necessary to make the award full compensation for appellee's loss up to the time of entry of judgment. By what right does this Court now assert that

the trial court was wrong in the determination of this fact issue,—that one element of the damages was omitted,—that the damage award was in truth an estimate of the net amount which appellee should have received in 1928, to which interest must be added to make the award complete compensation?

Whether $125,000 approximated what appellee would have earned in 1927, or whether the log movement was lighter in the beginning so that a much smaller sum would have been received, cannot be determined from the record. Perhaps the trial court thought the latter might be the fact, and concluded that $125,000 would be adequate to cover both the net earnings in the period and an additional allowance, the equivalent of interest, to compensate for the delay in getting the money.

But such inquiries are attempts to explore the mental processes of the trier of fact, and are entirely beyond the province of this Court. With the record such as to make the exact amount of damages impossible of ascertainment, the trial court fixed a lump sum as representative of the total damages sustained. This Court's direction to increase the damages by sixty per cent is unwarranted and beyond its power.

It has always been the rule in Oregon that "interest after the breach of a contract is recoverable only as

damages." *Ferguson v. Reiger*, 43 Or. 505, 73 Pac. 1040. *Seton v. Hoyt*, 34 Or. 266, 55 Pac. 967. In *Obermeier v. Mortgage Co. Holland-America*, 123 Or. 469, 480, 260 Pac. 1099, the Supreme Court of Oregon said:

> "It is to be borne in mind that this is an action to recover damages for the breach of a contract. It is so denominated in the complaint and in the brief of counsel for respondent. If plaintiff in any event is entitled to interest it is by reason of the fact that it is a part of the damages sustained. The jury found that the plaintiff was damaged in the sum of $1,400. It was unquestionably error for the trial court to increase the amount of damages by awarding plaintiff interest from the date of the execution of the lease."

This Court's ruling, upon a question local to Oregon, is thus directly contrary to the decisions of the Oregon Supreme Court. But there is a further serious mistake in the decision with respect to the allowance of interest in Oregon. Even upon the premise assumed, —that the award of $125,000 was intended to represent the net amount appellee would have had left from the log hauling,—this amount was not determined, nor was it determinable, until after the Court had heard testimony and made a finding as to the costs appellee would have incurred if it had conducted the operation.

Whatever may be the rule elsewhere, the Oregon Supreme Court has uniformly held that a damage award is not due, within the meaning of the Oregon interest statute, until the amount payable has been definitely fixed. This means that in breach of contract actions which require a finding upon a fact issue to determine what shall be paid, the damages prior to such finding are unliquidated damages, and interest is not collectible under the Oregon statute until after judgment. This rule was announced in *Hawley v. Dawson*, 16 Or. 344, 349, 18 Pac. 592, and it has never been departed from. In *Williams v. Pacific Surety Co.*, 77 Or. 210, 221, 149 Pac. 524, 526, the Court said:

> "There is no controversy about the nature of this action. It is for unliquidated damages, and the rule is well settled in this state that interest cannot be recovered thereon."

See also *Duncan v. Willapa Lumber Co.*, 93 Or. 386, 400, 182 Pac. 172, 177, in which the court said that "the question is settled beyond further discussion in this state."

The decision of this Court declines to follow the rule of these cases, and says, with reference to the two last cited *(Williams v. Pacific Surety Co.* and *Duncan v. Willapa Lumber Co.)*:

> "These cases seem overruled by the reasoning in *North Pac. Const. Co. v. Wallowa County*, 119 Ore. 565, 572, so far as they hold that any lack of liquidation of damages defeats any right to interest under the Oregon statute."

This is a surprising conclusion to draw from the decision in the *Wallowa County* case, particularly since the Oregon Supreme Court in a later case from which we have already quoted (*Obermeier v. Mortgage Co. Holland-America*, 123 Or. 469, 260 Pac. 1099) restated the rule precluding the allowance of interest upon a damage award in a breach of contract action, apparently with no thought that this was in any respect inconsistent with the decision in the *Wallowa County* case.

This Court has misread the *Wallowa County* case. It was not an action for damages for breach of contract, but a suit based upon contract, seeking to recover compensation for work actually done under the contract. It was the familiar equity suit in which the finding of an engineer was challenged for fraud or gross mistake. The recovery sought in such cases is not in any sense damages for breach of contract, but *quantum meruit* for work performed. The suit is essentially one to enforce contract rights; a court of equity ascertains what is due under the contract because the method prescribed by the contract for deter-

mining this has failed through fraud or gross mistake. See *Sweeney v. County of Jackson*, 93 Or. 96, 120, 178 Pac. 365, 372, in which the function of the court in such suits is stated as follows:

> " . . . it is the duty of the court to set aside the final estimate and institute an independent inquiry as to the amount of compensation which the plaintiff has earned, and is justly entitled to under the contract."

There is therefore absolutely nothing in the decision in the *Wallowa County* case which alters in any way the rule always followed in Oregon. If there could be any doubt as to this, it is removed by the later decision in the *Obermeier* case. Interest is not allowable under the Oregon statute in breach of contract actions for unliquidated damages. The statute as thus construed is mandatory. As said in *Hawley v. Dawson*, 16 Or. 344, 349, "If it is desirable to have a more liberal rule as to interest, it is the province of the legislature to introduce it and not the court."

But it must not be thought that this restriction has operated harshly upon appellee, even upon the assumption that the award of $125,000 represented the profits appellee would have made in 1927. The long delay in liquidating these damages by verdict or finding is not in any respect attributable to appellant. Appellee was playing for much higher stakes; its in-

volved claim that the construction work was altered (the first claim or cause of action of the complaint) and that $326,785 additional was due for the construction work done (R. pp. 7-17), which claim was disallowed entirely (R. pp. 161-163), brought about the reference to an auditor, and the time-consuming procedural steps which followed. In addition, there was complete inaction for more than two years; at one time dismissal for want of prosecution under a rule of court was imminent (R. pp. 176-177, 330). In these circumstances the imposition of a heavy interest charge, upon the theory that appellee has been made to wait for its money, is altogether unjust. The damage claim for breach of the commercial haul clause of the contract could have been liquidated promptly had appellee so desired so that adherence to the rule of the Oregon interest statute would have worked no hardship upon it.

The theory upon which appellee claimed interest was that the contractor became entitled to the contract price at once when the logs were hauled, just as if it had conducted the haul, and that the deductible operating costs, thereafter estimated, were merely an offset or counterclaim which did not affect the obligation to pay the contract price at the time specified in the contract. (Opening Brief of Cross-Appellant, pp. 35-

36.) The fallacy of this is obvious; appellee did not conduct the haul and nothing was due for hauling service under the contract. If appellee was wrongfully deprived of the opportunity to do the hauling, it became entitled to damages measured by the net profits it would have made; and such profits could not be other than unliquidated damages until they were agreed to or judicially ascertained.

This Court proceeds upon a different theory. The decision seems to agree that the damages attributable to the alleged breach were unliquidated. It is said, however, that the Railway Company promised to pay these unliquidated damages at the time prescribed for payment of the balance certified to be due in the final estimate of the Chief Engineer. This, according to the decision, results from the contract requirement that the contractor must execute a full discharge of all claims upon receiving such final payment.

But the contract says just the opposite. It is the balance certified to be due by the Chief Engineer, and only such balance, which the Railway Company agreed to pay within thirty days after the date of the final estimate. Of course the contractor was required to release and discharge all claims upon receiving this payment. Obviously an owner would not make the payment if the contractor had unsettled claims and

refused to execute a full release. All that can be implied from this is that the contractor could not get the balance certified to be due by the Chief Engineer until the disputed claims were settled or adjudicated.

The Court's reasoning seems to be this: Because the contractor had to sign a full release of all claims before he could get the amount certified to be due by the Chief Engineer, and because the amount so certified was payable within thirty days after the date of the certificate, the agreement to pay such certified balance must be read as obligating the Railway Company to settle all disputes, or perhaps to litigate them, within the thirty-day period, and to pay then all damages which might be assessed for any breach of contract.

The books will be searched in vain for any such interpretation of a provision which undoubtedly has been in construction contracts for many years. Parties occasionally include in their contracts provisions for stipulated damages in the event of a breach. But we venture to say that until now it has not occurred to anyone that provisions for the execution of full releases at the time of final payment under a contract are to be read as defining the obligation of the loser in a subsequent breach of contract action, with re-

spect to the time when unliquidated damages are to be paid.

What has been said on this subject of course assumes that the $125,000 award was a determination of the net profit appellee would have made from the hauling, and not a finding of the full damage attributable to the alleged breach. This assumption we believe to be totally unwarranted. Making it for the purpose of the argument, we insist that appellant made no promise in its contract as to what it would do in the event it breached its contract. Certainly appellant nowhere in the contract agreed that it would pay, within thirty days of the date of the Chief Engineer's final estimate, damages the precise amount of which would not be known until the breach was established and the damages determined in subsequent litigation.

The Oregon statute forbids the allowance of interest in breach of contract actions prior to the ascertainment or liquidation of damages. This is the construction given the statute by the Oregon courts. The decision of this Court upon this local question is in conflict with the applicable Oregon decisions.

Respectfully submitted,

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Of Counsel for Appellant.

I, CHARLES A. HART, counsel for appellant herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that said petition is not interposed for delay.

CHARLES A. HART,
Counsel for Appellant.